BEFORE THE MISSISSIPPI PUBLIC SERVICE COMMISSION

MISSISSIPPI PUBLIC SERVICE COMMISSION **2019-UA-116**

IN RE: PETITION OF MISSISSIPPI POWER COMPANY FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR ENVIRONMENTAL COMPLIANCE ACTIVITIES AUTHORIZING THE CLOSURE OF THE ASH POND, CONSTRUCTION OF LOW VOLUME WASTEWATER TREATMENT FACILITIES, AND CONVERSION OF BOTTOM ASH COLLECTION FACILITIES FOR THE PLANT VICTOR J. DANIEL ELECTRIC GENERATING FACILITY IN JACKSON COUNTY MISSISSIPPI

SIERRA CLUB'S COMMENTS ON MISSISSIPPI POWER'S PROPOSED ORDER

1. Introduction

Mississippi Power Company's ("MPC" or "Mississippi Power") Proposed Order in this docket would basically repeat the Kemper IGCC mistake on a smaller scale.

Just as in the *Kemper* docket, MPC proposes that the pursuit of "fuel diversity" requires ratepayers to pay higher electricity prices for a plant that can't compete on economics.[1] Just as in the *Kemper* docket, the company demands immediate action to avoid a debacle. Mississippi Power even goes a step beyond *Kemper* in the proposed order, and tells the Commission it does not need to make the factual record required by law.

This approach didn't work out for ratepayers in *Kemper*, and it will not work out this time.

MPC's Petition, and the Proposed Order, do not take into account some basic facts. As set out in the analysis by Synapse Energy Economics attached as Exhibit 1:

1. Plant Daniel cannot compete on the power market, and is a burden to ratepayers.

[1] Proposed Order at 3.

2. By closing Plant Daniel, MPC can take advantage of a longer closure period for the ash pond, and ratepayers can avoid tens of millions in capital expenditures.

3. MPC's analysis of Plant Daniel's value to ratepayers, which the company has not adequately provided to the Commission at this point, is premised on incorrect assumptions.

As further explained in these comments, MPC is also asking the Commission to issue a certificate without following basic principles of due process and administrative decision making. MPC requests that the Commission make no findings of fact on the basic issues, and defer any analysis of Plant Daniel's costs and benefits for customers to some other, later proceeding. This violates the statutes governing the issuance of certificates and basic principles of administrative law. As explained in the Sierra Club's pending motion to require Mississippi Power to supplement its petition, the proper course forward is to require MPC to supplement its petition, and set a schedule that allows adequate review of the basis for the petition.

2. Mississippi law requires a hearing and consideration of the costs and benefits of continued operation of Plant Daniel.

The Mississippi Supreme Court has recognized that this Commission has a critical role to play in protecting the public:

> In effect the Commission is the counterpart of the market place by which other businesses are measured. This is so because public utilities are monopolies engaged in the business of furnishing necessary services to the public. Obviously, the legislative intent in creating the Public Service Commission was to interpose an authoritative body between the rate payers of the utility and the investors in the utility so that their respective interests, necessarily antagonistic, might be equitably served. The crucible of the competitive market place to which business concerns, other than monopolies, are necessarily exposed is thus avoided so that economic waste by overlapping and duplicating services will not occur.

State ex rel. Allain, 435 So.2d 608, 612 (1983).

The statutes governing issuance of certificates are intended to carry out the Commission's role of standing in the place of the market to protect consumers.

Under Mississippi Law, "[n]o person shall construct, acquire, extend or operate equipment for manufacture, generating, transmitting or distributing electricity for any intrastate or interstate sale to or for the public for compensation without first having obtained from the commission a certificate that the present and future public convenience and necessity require or will require the operation of such equipment or facility."[2]

Miss. Code Ann. § 77-3-13 provides that other than certain pre-existing facilities, certificates will be issued only after a hearing involving, among other things, the need for the services at issue:

> (3) In all other cases, **the commission shall set the matter for hearing,** and shall give reasonable notice of the hearing thereon to all interested persons, as in its judgment may be necessary under its rules and regulations, involving the financial ability and good faith of the applicant, the necessity for additional services and such other matters as the commission deems relevant.[3]

In addition to this provision, Miss. Code Ann. § 77-3-14(2) clearly contemplates that the Commission will consider needed generation reserves, future electricity use, and other factors "in order to achieve maximum efficiencies for the benefit of the people of Mississippi . . . ." In past certificate proceedings the Commission has developed a record considering the fundamental need for the proposed electric generation facilities in light of the full suite of economic and practical factors. This includes the docket which permitted MPC to add over $300 million in scrubbers to Plant Daniel.[4] It is difficult to see how the public convenience and necessity could be evaluated otherwise.

Consideration of alternative courses of action and their factual underpinnings is also necessary to meet the minimum requirements of reasoned decision making and

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[2] Miss. Stat. § 77-3-11.

[3] *Id.* (emphasis added).

[4] Final Certificate Order, No. 2010-UA-279 (April 3, 2012).

provide a record for appeals. The Commission is required by statute to articulate the factual findings and policy decisions which lead to issuance or denial of a certificate in sufficient detail to allow the courts to determine the basis of the Commission's conclusions:

> The commission shall make and file its findings and order, and its opinion, if any. All findings shall be supported by substantial evidence presented and shall be in sufficient detail to enable the court on appeal to determine the controverted questions presented, and the basis of the commission's conclusion.

Miss. Code Ann. 77-3-59.

Without such a record, the courts will find that the Commission's action contains an error or law, and "is not supported by substantial evidence . . . ." Miss.Code Ann. 77-3-67 (2000). This is exactly what happened in *Sierra Club v. Mississippi Public Service Commission and Mississippi Power Company,* No. 2011-CA-00350-SCT (Mississippi Supreme Court April 15, 2012). These specific statutes applicable to the Commission are consistent with the basic principle of administrative law that an agency must explain the basis for its decisions, otherwise the courts cannot determine whether the decision was reasoned or arbitrary and capricious. *E.g. McGowan v. Ms. State Oil & Gas Board,* 604 So.2d 312, 317 (Miss. 1992) (conclusory statements must be substantiated if they are to be upheld on appeal, because conclusory remarks alone do not equip a court to review the agency's reasoning).

The United States Supreme Court has repeatedly held that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfr.'s Ass'n v. State Farm,* 463 U.S. 29, 43 (1983). "Without such findings, a reviewing court is unable to perform its function of ascertaining that the ultimate conclusions are derived from the record before the

agency and not the result of discretion exercised in an arbitrary and capricious manner." *Argo Collier Truck Lines v. ICC,* 611 F.2d 149 (6th Cir. 1979).

Mississippi Power Company proposes that the Commission to affirmatively state that it is ***not*** going to make any findings on the basic factual issues that underlie any certificate of public convenience and necessity. This is not just bad policy, it is a clear error of law.

The suggestion that the Commission may defer consideration of the basic issues to some other docket also violates principles of due process. MPC proposes to have the Commission approve approximately $45 million in expenditures – the bottom ash and low volume waste water systems – which are unnecessary if the extended closure period option is taken. The Commission has held that once a decision is made on the certificate, expenditures by MPC are presumed to be prudent.[5] $45 million is a lot of money to MPC's ratepayers, and they should not be stuck with that bill without an adequate factual foundation.

The Commission's obligation is to stand in for the free market. It is fair to ask this question: would any company in the free market spend $45 million without making a decision and factual findings about whether it was a good investment? Yet that is what MPC is proposing that the Commission do here.

3 <u>The timing of data requests and testimony does not excuse Mississippi Power from supporting its multi-million dollar requests.</u>

Mississippi Power also asks the Commission to state that the timing of data requests and testimony in this docket mean that the Commission is excused from making the factual findings necessary to stick the ratepayer with anywhere from $45 million in at best questionable expenditures at Plant Daniel. There is no basis in the Commission's rules for this position, and

[5] In re: Petition of Mississippi Power Company for Finding of Prudence in Connection with the Kemper County IGCC Generating Facility, Order of October 15, 2013.

to so hold would be *per se* arbitrary and capricious. As of the date that the Sierra Club submitted its data requests, there was no scheduling order, no hearing date, and no deadlines in place. The Commission's rules do not provide a deadline for submitting testimony in a certificate proceeding.

The Sierra Club's requests were submitted slightly over a month after its intervention was granted. Accepting Mississippi Power's invitation to dismiss any factual challenge on this basis would be bushwhacking parties who were operating in good faith. The Commission should not dismiss a legitimate critique of the Application because MPC decided to wait for a year after the final rule to file.

Of course, Mississippi Power has been supplementing its responses to the data requests of the Staff essentially right up to the present date. The information in these supplements is some of the information that the parties and the Commission need to assess to determine whether Plant Daniel warrants the additional investment MPC demands. As the Synapse report in Exhibit 1 establishes, MPCs recently filed data responses further indicate that Plant Daniel is uneconomic for the customer, and that there is a better alternative path to that proposed by MPC.

4. Critical Information is still lacking in this docket, including supporting testimony from MPC.

Although some information has been supplied through data request responses, the list of missing information remains significant, and MPC has provided no supplemental testimony. Among the matters on which MPC has no testimony and no position in the record are the following:

- An estimate of the impact of the cost of facilities upon rate base and rates as required by the Commission's rules.
- The impact of Gulf Power's 2024 retirement of its 50% interest in Plant Daniel.

- The nature of the transmission constraints MPC asserts, and whether those constraints are even the responsibility of MPC and its ratepayers.
- The claimed risks associated with the alternative transmission improvement plan.

In short, Mississippi Power's petition fails to adequately address the basic informational requirements for a certificate. The proposed order basically has the Commission defaulting on its duty to ratepayers. The company is asking the Commission to forego any factual findings in the name of "fuel diversity," apparently without consideration of what is the best deal for the ratepayer. "Fuel diversity" proved very expensive in the Kemper docket. The Commission should not go down the same road here.

Respectfully submitted this 30th day of September, 2019.

Respectfully submitted,
Mississippi Chapter Sierra Club

By: _____

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CERTIFICATE OF SERVICE

I, Robert B. Wiygul, counsel for Sierra Club do hereby certify that in compliance with RP6.122(2) of the Commission's Public Utilities Rules of Practice and Procedure (the "Rules").

(1) An original and twelve (12) true and correct copies of the filing have been filed with the Commission by United States Postal Service this date to:

Katherine Collier, Executive Secretary
Mississippi Public Service Commission
501 N. West Street, Suite 201-A
Jackson, MS 39201

(2) An electronic copy of the filing has been filed with the Commission via e-mail to the following address: efile.psc@psc.state.ms.us

(3) An electronic copy of the filing has been served via e-mail to the following address:

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This the 30th day of September, 2019.

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